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In The

Supreme Court of the United States

October Term, 1992

SAMSUNG ELECTRONICS AMERICA, INC.,
a New York corporation, and
DAVID DEUTSCH ASSOCIATES, INC.,
a New York corporation,

Petitioners,

vs.

VANNA WHITE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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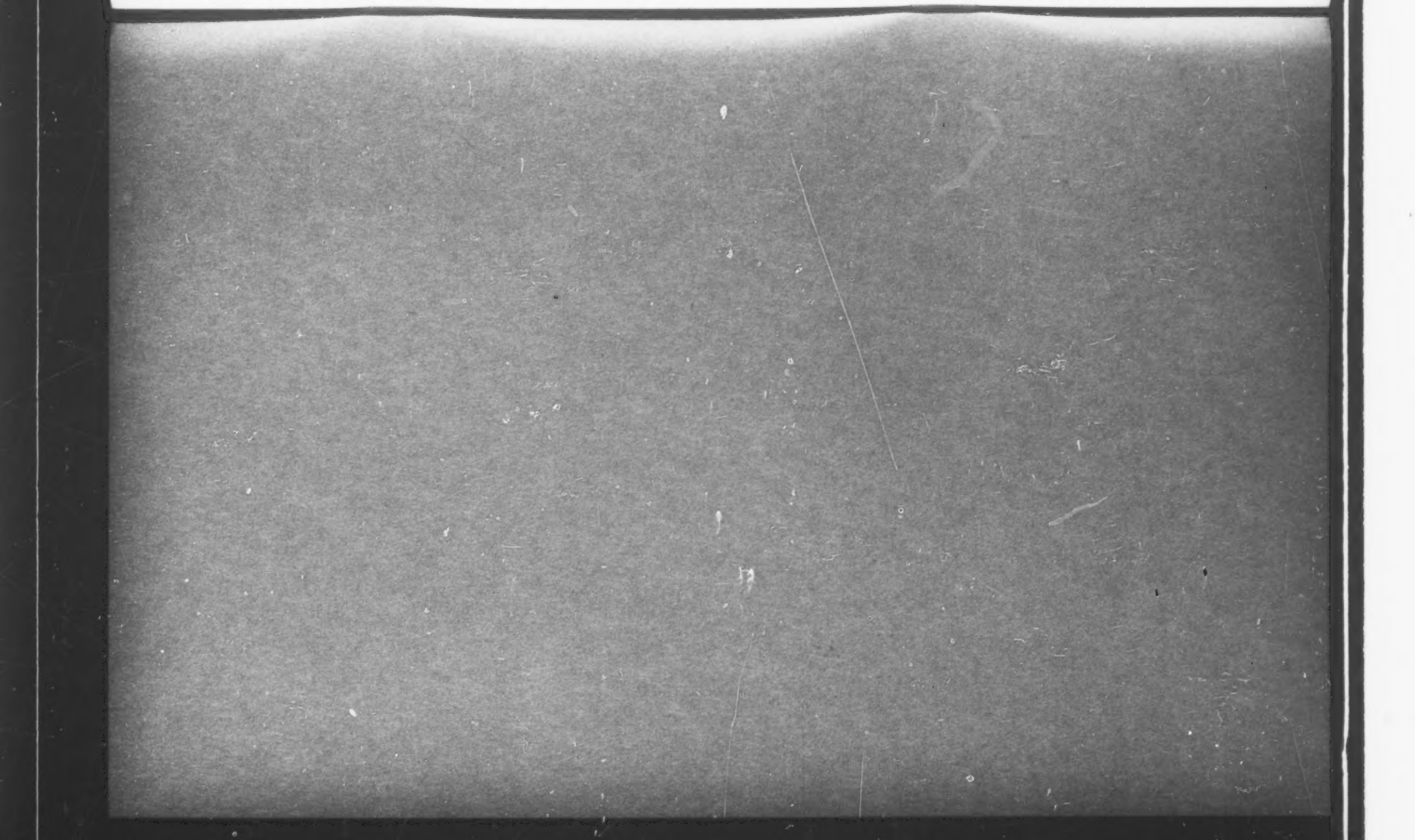

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I

INTRODUCTION AND SUMMARY OF REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The Petition for a Writ of Certiorari (the "Petition") by defendants Samsung Electronics America, Inc. and David Deutsch Associates, Inc. (collectively "Petitioners" or "Defendants") improperly seeks to invoke the authority of this Court to decide a false issue not in need of Supreme Court resolution. Specifically, Petitioners ask this Court to determine what they now contend to be an important issue of constitutional law that they (1) did not plead, (2) did not argue in support of the summary judgment they obtained in the District Court and (3) only pursued in the District Court and the Court of Appeals in a "perfunctory and undeveloped" manner. Even if Petitioners' "new" issue were procedurally ripe for review, this Court has previously dealt with it and no new Supreme Court direction is necessary.

Petitioners ask this Court to grant certiorari for the purpose of deciding "whether parody in a commercial advertisement is fully protected by the First Amendment." Petition at 5. The Court of Appeals for the Ninth Circuit has held that the advertisement in issue raises a jury question as to whether Petitioners have misappropriated Respondent Vanna White's right to publicity under California common law. Petitioners neglect to inform the Court, however, that *they never even pleaded* any affirmative defense based on the First Amendment, parody, fair use or any other legal principle remotely resembling the issue they now so passionately pursue. They also fail to mention that the grounds upon which they obtained summary judgment against Ms. White on this claim are not

those upon which they now seek review. Indeed, Petitioners' case below – both at the trial and appellate level – turned on a theory in direct conflict with their theory here. For these reasons, this Court should not grant certiorari.

Nor does it need to. Petitioners advertise this case as one of broad import involving an issue on which this Court has never ruled. Using the magic words "chilling effect" to describe the imagined consequences that will plague the advertising community unless this Court takes up the issue, Petitioners claim entitlement to relief. They are wrong on both counts. The significance of the dispute between Petitioners and Vanna White is extremely limited. Perhaps more significantly, this Court has already spoken on the issue Petitioners advance and need not do so again. Accordingly, this matter does not merit the substantive attention of this Court.

II

STATEMENT OF THE CASE

Ms. White has no quarrel with Petitioners' Statement of the Case to the extent it quotes the Court of Appeals' summary of the pertinent facts and District Court proceedings. Petition at 2-3 and Pet. Appx. A at 2-3.[1] However, she does dispute Petitioners' characterization of the Court of Appeals' decision and the validity of the "Questions Presented" by Petitioners. Specifically, Petitioners'

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[1] The appendix attached by Petitioners to the petition is cited here as "Pet. Appx.," while the appendix attached to this brief is cited as "Resp. Appx."

assertion that they properly argued "that their advertisement was a parody that constituted protected speech," Petition at 3, misrepresents the record.[2] Moreover, to the extent that argument was made at all, it was properly rejected by the Court of Appeals after consideration of the applicable authorities, *including authorities never once cited by Petitioners below* but which *now* suddenly form the *entire* basis for their appeal to this Court. Accordingly, the Petition for Writ of Certiorari must be denied.

III

ARGUMENT

This case does not present an issue that merits or requires input from this Court.

A. No "Special And Important" Reasons Justify Supreme Court Attention To This Case.

Petitioners purport to offer two issues for this Court's consideration: (1) whether a "parody" appearing in a commercial advertisement should be "stripped" of its

---

[2] While the Court ordinarily does not consider the record unless and until it actually grants certiorari, the fact that it bears on whether to issue the Writ in the first place obligates us to point out certain pertinent facts in the record. S.Ct. Rule 15.1. Accordingly, attached hereto as appendices A, B, C and D, respectively, are true and correct copies of Defendants' answer, their motion for summary judgment to the District Court, their accompanying Statement of Uncontroverted Facts and Conclusions of Law, and their brief to the Ninth Circuit Court of Appeals urging affirmance of the District Court's entry of summary judgment in their favor.

alleged First Amendment protection; and (2) whether the Court below erred in purportedly "summarily reject[ing] any First Amendment defense for 'garden variety commercial speech'. . . . " While stated separately, these "issues" are really one and the same; significantly, however, they fail to acknowledge the important rights of Vanna White infringed by the subject advertisement, which were considered by the Court of Appeals and are implicated now by the review Petitioners ask this Court to undertake. Petitioners pretend that Ms. White's right of publicity, carefully cultivated to enhance and preserve her commercial value as a celebrity spokesperson, is not involved. Because it most assuredly is, the real issue before this Court is whether Petitioners have an absolute right under the First Amendment to misappropriate Ms. White's right of publicity for their own profit in a commercial advertisement without compensating her or obtaining her permission.[3] That issue does not presently require this Court's review.

This Court will grant a writ of certiorari "only when there are special and important reasons therefor." S.Ct. Rule 15.1. The Court may exercise its discretion when "a United States court of appeals has decided an important question of federal law *which has not been*, but *should be*, settled by this Court. . . . " *Id.* Rule 15.1(c) (emphasis added). This is not such a situation.

---

[3] In fact, since Petitioners' summary judgment motion in the District Court did not seek a ruling on any affirmative defense at all – much less one based on the First Amendment or some parody theory – even this limited issue has not been resolved below and is consequently not a proper subject for review by this Court.

First, for Petitioners to warn of a "chilling effect" on "all businesses in the country who advertise" (Petition at 5, 7), overstates the implications of what this Court is being asked to consider. Celebrities' rights of publicity have been recognized for quite some time, yet only a handful of cases have surfaced in the area over the past nineteen years. *See, e.g., Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1047, 122 L.Ed.2d 355 (1993); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied, sub nom. Young & Rubicam, Inc. v. Midler*, ___ U.S. ___, 112 S.Ct. 1513, 117 L.Ed.2d 650 (1992); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); *Eastwood v. Superior Court*, 149 Cal. App. 3d 409 (1983). This Court apparently recognizes this fact, having rejected certiorari petitions in the most recent cases in this area, *Waits* and *Midler*.

Perhaps this is because the Court already *has* spoken on this subject. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), this Court resolved, in favor of the party who (like Vanna White) sought to enforce his right of publicity, virtually the identical issue raised in the Petition. The Court held that a news organization – asserting a traditionally greater protection for its activities than that afforded commercial speakers like Petitioners – had no First Amendment right to appropriate plaintiff's publicity rights without his permission and without compensating him. Like Ms. White, the plaintiff in *Zacchini* sought only to enforce "the right of the individual to reap the reward of his endeavors" by getting the "commercial benefit of [the] publication . . . of the

very activity by which the entertainer acquired his reputation in the first place." 433 U.S. at 573, 576. Even though Mr. Zacchini's act was broadcast as news, rather than a commercial advertisement, this Court held that the First Amendment does not privilege defendants to make such an appropriation without compensating the entertainer.

Since the only real issue raised by the Petition has already been settled by the Supreme Court, there is no reason to grant the writ Petitioners seek.

B. Petitioner's Arguments Below Directly Contradict Those They Attempt To Raise Here.

In a bold act of legal legerdemain, Petitioners have recently concocted a constitutional issue that they *never even raised as an affirmative defense.* Their answer asserts only two affirmative defenses. They read in full as follows:

> **FIRST AFFIRMATIVE DEFENSE**
>
> Attached hereto as Exhibit "A" is a true and correct copy of the advertisement in issue. This advertisement clearly depicts a robot – i.e., a non-human being – *which could not by any stretch of the imagination be mistaken for plaintiff* and plaintiff's complaint, and each cause of action therein, therefore fails to state a claim upon which relief can be granted.
>
> **SECOND AFFIRMATIVE DEFENSE**
>
> Plaintiff's complaint, and each cause of action therein, fails to state a claim upon which relief can be granted.

Answer, Resp. Appx. A at App. 6 (emphasis added). Fed. R. Civ.P. 8(c) provides that " a party *shall set forth affirmatively* . . . any . . . matter constituting an avoidance or affirmative defense." (Emphasis added.) The appellate courts will refrain from considering a defense not pleaded below as required by Rule 8(c). *See, e.g., Roberts v. College of the Desert*, 870 F.2d 1411, 1414 (9th Cir. 1988); *Walsh v. Mellas*, 837 F. 2d 789, 800 (7th Cir. 1988) *cert. denied*, 486 U.S. 1061 (1988). This Court also held it will not address matters not pleaded or pursued below. *See, e.g., FTC v. Grolier, Inc.*, 462 U.S. 19, 23, n.6 (1983); *Tennessee v. Dunlap*, 426 U.S. 312, 316, n.3 (1976).

Not only is Petitioners' present theory "new," it is *completely inconsistent with the theory they used to obtain summary judgment and to oppose Ms. White's appeal of that decision*. Petitioners' new "parody" argument assumes that their advertisement actually was intended to, and did, "conjure up" (or more directly represent) Vanna White, presumably for the purpose of poking fun at her. *See, e.g., Fisher v. Dees*, 794 F.2d 432, 438-39 (9th Cir. 1986); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253, n.1 (2nd Cir. 1980). However, Petitioners have steadfastly defended this action – and, indeed, won a summary judgment in their favor – with the argument that no reasonable person could *possibly* confuse the robot in their ad with Vanna White (the "It's Not Vanna" argument). *See* Answer, Resp. Appx. A at App. 6; Order Granting Summary Judgment, Pet. Appx. C at A-50.

The zeal with which Petitioners pushed their It's Not Vanna position in the District Court and Court of Appeals is manifest. In their summary judgment brief, Petitioners argued:

> It is obvious beyond any doubt . . . that defendants have depicted a non-human robot, *that they chose not to represent Vanna White or any other human being.*
>
> This is so obvious that the claim should be dealt with as a matter of law.

Resp. Appx. B at App. 16-17 (emphasis in original). They went on to argue that judgment should be entered in their favor "because . . . no one could construe the ad as showing the plaintiff, or, indeed, *any* human being." *Id.* at App. 18 (emphasis in original). The "Statement of Uncontroverted Facts and Conclusions of Law" submitted in support of Petitioners' summary judgment motion also directly contravenes – and fails anywhere to mention a single fact in support of – their new parody notion. It states:

* * *

> 4. The robot depicted in said advertisement is not a likeness of plaintiff Vanna White.
>
> 5. A reasonable person could not mistakenly identify, or compare said depiction of a robot with, plaintiff Vanna White.

Resp. Appx. C at App. 27. Petitioners won their summary judgment motion at the trial level because the District Court accepted this argument.

Petitioners repeated the It's Not Vanna argument in their unsuccessful effort to preserve that victory at the appellate level:

> By choosing to use a robot in the advertisement rather than a lady of any age, defendants *intended* to, and *did*, avoid *any representation or inference* that the depiction of the 2012 A.D.

> game show included a depiction of Vanna White or any other human being.

Resp. Appx. D at App. 35 (emphasis added). Petitioners' Ninth Circuit appeal brief also repeated the precise language used in their summary judgment motion: "It is obvious beyond any doubt . . . that defendants depicted a non-human robot, *that they deliberately chose not to represent Vanna White or any other human being.*" *Id.* at App. 37 (emphasis in original). These persistent assertions that the advertisement at issue neither intended to nor did depict Vanna White are wholly antithetical to the parody theory Petitioners now advance in a vain effort to shoulder open a "constitutional" door.

Recognizing this, Petitioners did not seriously pursue below the issue on which they rest their hopes here. Rather, they mentioned this issue only in passing, buried in pages of broad, vague, unexplicated and undifferentiated references to general areas of law, the significance of which they never discussed, perhaps for fear of highlighting the glaring contradiction between their original It's *Not* Vanna theory and their parody theory (which states, in essence, that the ad *does* portray Vanna White, but only in a joking, constitutionally protected way). In both their summary judgment motion and their brief to the Court of Appeals, Petitioners, as an apparent afterthought, suggested (without explaining) that the court's "consideration should be informed by some [without identifying which] principles and concepts in cognate areas: *Freedom of Speech* [followed by $^2/_3$ of a page of string cites] . . . *Public Domain* status of ideas and expression [followed by $^1/_2$ of a page of string cities] . . . *Contract/ Copyright* [followed by $^1/_3$ of a page of string cites]

. . . *Performers' Rights* [followed by 1/2 of a page of string cites] . . . *Artistic Freedom* [followed by 1/2 of a page of string cites] . . . *Fair Use* [followed by a page of string cites] . . . *Humor/Parody Privilege* [followed by 2/3 of a page of string cites]. . . . " *See* Resp. Appx. B and D at App. 23-25 and 44-46. What the courts below could possibly have extracted from this random and unelucidated shotgun approach was not for them to figure out; it was for Petitioners to explain. Having failed to do so, Petitioners cannot now seek this Court's review of hitherto neglected arguments. *See, e.g., Kensington Rock Island v. American Eagle Historic Partners,* 921 F.2d 122, 124-25 (7th Cir. 1990) ("Arguments raised in the District Court in a 'perfunctory and undeveloped . . . manner' are waived on appeal") (citation omitted); *Hays v. Sony Corp. of America,* 847 F.2d 412, 420 (7th Cir. 1988) ("to be preserved, an argument must be *pressed,* and not merely *intimated*") (emphasis added) (citations omitted).

The Ninth Circuit Court of Appeals recognized that Petitioners' appeal focused on the It's Not Vanna theory, not on the premise that the ad is a parody of Ms. White:

> If, *as Samsung claims, its ad was based on a "generic" game-show hostess and not on Vanna White,* the ad would not have violated anyone's right of publicity, but it would also not have been as humorous or effective.

See Ct. App. Order, Pet. Appx. A at A-12, n.3 (emphasis added). Nevertheless, the court accorded the parody issue more attention than Petitioners themselves, ultimately rejecting it as follows:

> Samsung's [parody] argument is unavailing. . . . Unless the first amendment bars all right of publicity actions – and it does not,

> *see Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) – then it does not bar this case.

Id. (citations omitted). As the Court of Appeals properly concluded, Petitioners' own It's Not Vanna arguments and this Court's *Zacchini* decision bar Petitioners from obtaining the relief they now request. Consequently, the petition for writ of certiorari should be denied.

C. The Court Of Appeals Addressed And Properly Decided The Issues Mentioned In The Petition.

Petitioners misapprehend the law they now argue is controlling. They also fail to recognize that the Court of Appeals properly applied that law. Thus, even if Petitioners could overcome the fatal deficiencies discussed above, the Petition should be denied.

First, petitioners mistakenly assert that "a parody is immune from sanction in the form of damages, unless a plaintiff shows a false statement of fact made with 'actual malice,' " citing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Petition at 5. Even if their ad was a parody – an issue that has not been litigated or decided below – the *Hustler* case does not protect it. In *Hustler*, the only cause of action held barred by the First Amendment was one for intentional infliction of emotional distress. The case did not eliminate all tort actions defended on First Amendment grounds, nor did it eviscerate the right of publicity claims at issue here and in *Zacchini*. Indeed, the Court cited *Zacchini* in its *Hustler* opinion, 485 U.S. at 52, thereby recognizing the continued viability of right of

publicity claims challenged on First Amendment grounds.

Petitioners get no further with their sudden reliance on *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) – a case Petitioners never cited below, but no doubt became enamored of while reading Judge Kozinski's impassioned dissent from the Ninth Circuit's denial of their petition for rehearing *en banc* – or this Court's recent decision in *City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 61 U.S. Law Week 4272 (Mar. 24, 1993). Neither case affects the viability of Ms. White's cause of action for misappropriation of her right of publicity.

Relying on these cases, Petitioners first make the outrageous assertion that their advertisement is not commercial speech, and thus "deserves full constitutional protection," because it "does not propose a commercial transaction." Petition at 7. Even Judge Kozinski does not go that far. Clearly, the ad "proposes a commercial transaction"; it solicits the purchase of Samsung VCRs. Thus, as this Court has held and the Court of Appeals recognized, the ad constitutes "commercial speech" which merits less constitutional protection than other forms of speech. Pet. Appx. A at A-12, n. 3; *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989); *Central Hudson*, 447 U.S. at 562-63, n. 5.

Petitioners are thus limited to the argument that the Court of Appeals did not explicitly apply the four part *Central Hudson* analysis. *See* Petition at 8-10. Whether or not the Court of Appeals was *required* to do so point by

point Petitioners do not discuss. Nor have they established that the Court of Appeals did not in fact utilize the *Central Hudson*, analysis. Indeed, the court – on its own – acknowledged the *Central Hudson* case, considered it and determined that it should not alter its conclusion. This was more than Petitioners should have expected, since they never even *cited* the case to the Court of Appeals.

The result below is entirely consistent with *Central Hudson* and *City of Cincinnati*: (1) the ad at issue here constitutes commercial speech; (2) the "governmental interest" in the "regulation" imposed by the common law right of publicity doctrine, which this Court itself has endorsed, is substantial; (3) the "regulation" – a common law cause of action for damages – directly advances that interest; and (4) it is no more extensive than is reasonably necessary to further that interest. *Bd. of Trustees*, 492 U.S. at 477; *Central Hudson*, 447 U.S. at 566. Indeed, as this Court recognized in the context of news stories (which receive full First Amendment protection), a suit to enforce the right of publicity does not *restrict* speech; it simply ensures that the plaintiff who owns and has developed that right is fairly compensated for its use. *Zacchini*, 433 U.S. at 578. In contrast, the *statutory* provision in *City of Cincinnati* and *Central Hudson* completely prohibited certain types of commercial speech. Therefore, these inapposite cases do not justify disturbing the Court of Appeals' carefully considered opinion in this case.

In fact, the Petition's final two and one-half page section is nothing but a bright red herring. Petitioners' claim that "[t]he Court of Appeals has created a dangerous precedent by summarily rejecting any First Amendment defense without applying the *Central Hudson*

test." Petition at 9. This is not true. What's more, it *could not possibly be true.* Petitioners' purported "First Amendment defense" does not appear in their answer, was not a basis of their summary judgment motion in the District Court and thus was never an issue for the Court of Appeals to decide. It is important to remember that this case *has never been tried* and the validity of Petitioners' defenses has never been adjudicated in any court. Consequently, this issue is hardly ripe for consideration by the United States Supreme Court.

Defendant's petition for a writ of certiorari should be denied and Ms. White should be permitted her long overdue day in court.

Respectfully submitted,

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APPENDIX A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VANNA WHITE, Plaintiff, vs. SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, and DAVID DEUTSCH ASSOCIATES, INC., a New York corporation.	CASE NO. 88-06499 RSWL(Sx) ANSWER TO COMPLAINT FOR DAMAGES

COME NOW defendants Samsung Electronics America, Inc., and David Deutsch Associates, Inc., and for answer to the complaint herein admit, deny and allege as follows:

1. Defendants admit the allegations of paragraph 1.

2. Defendants admit the allegations of paragraph 2.

3. Answering paragraph 3, defendants allege they have no information or belief sufficient to enable them to

answer the allegations contained therein, and, basing their denial on that ground, deny generally and specifically, each and every, al [sic] and singular, said allegations.

4. Defendants admit the allegations of paragraph 4.

5. Defendants admit the allegations of paragraph 5.

6. Answering paragraph 6, defendants allege they have no information or belief sufficient to enable them to answer the allegations contained therein, and, basing their denial on that ground, deny generally and specifically, each and every, al [sic] and singular, said allegations.

7. Answering paragraph 7, defendants allege they have no information or belief sufficient to enable them to answer the allegations contained therein, and, basing their denial on that ground, deny generally and specifically, each and every, al [sic] and singular, said allegations.

8. Answering paragraph 8, defendants allege they have no information or belief sufficient to enable them to answer the allegations contained therein, and, basing their denial on that ground, deny generally and specifically, each and every, al [sic] and singular, said allegations.

9. Answering paragraph 9, defendants allege they have no information or belief sufficient to enable them to answer the allegations contained therein, and, basing their denial on that ground, deny generally and specifically, each and every, al [sic] and singular, said allegations.

10. Answering paragraph 10, defendants admit that the subject advertisement was created and caused to be published by defendant David Deutsch Associates, Inc., as advertising agency for defendant Samsung Electronic

America, Inc. Save and except as herein expressly admitted, defendants deny generally and specifically, each and every other allegation contained in paragraph 10.

11. Answering paragraph 11, defendants admit that said advertisement has been published in magazines of general circulation. Save and except as herein expressly admitted, defendants deny generally and specifically, each and every other allegation contained in paragraph 11.

12. Answering paragraph 12, defendants admit that they neither solicited nor received plaintiff's approval of said advertisement and further admit that on occasion they have paid individuals for permission to use their photographs in advertisements. Save and accept as herein expressly admitted, defendants deny generally and specifically, each and every other allegation contained in paragraph 12.

ANSWER TO FIRST CAUSE OF ACTION

13. Answering paragraph 13, defendants refer to and incorporate by said reference as though fully set forth herein all of their answers to paragraphs 1 through 12 herein.

14. Answering paragraph 14, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

15. Answering paragraph 15, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

16. Answering paragraph 16, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

ANSWER TO SECOND CAUSE OF ACTION

17. Answering paragraph 17, defendants refer to and incorporate by said reference as though fully set forth herein all of their answers to paragraphs 1 through 12 and 14 herein.

18. Answering paragraph 18, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

19. Answering paragraph 19, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

20. Answering paragraph 20, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

21. Answering paragraph 21, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

22. Answering paragraph 22, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

ANSWER TO THIRD CAUSE OF ACTION

23. Answer paragraph 23, defendants refer to and incorporate by said reference as though fully set forth

herein all of their answers to paragraphs 1 through 12, 14 and 18 through 20 herein.

24. Answering paragraph 24, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

25. Answering paragraph 25, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

26. Answering paragraph 26, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

27. Answering paragraph 27, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

28. Answering paragraph 28, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

ANSWER TO FOURTH CAUSE OF ACTION

29. Answering paragraph 29, defendants refer to and incorporate by said reference as though fully set forth herein all of their answers to paragraphs 1 through 12, 14, 18 through 20 and 24 through 27 herein.

30. Answering paragraph 30, defendants admit that said advertisement advertises an electronic product which is sold in interstate commerce. Save and except as herein expressly admitted, defendants deny generally and specifically, each and every other allegation contained in paragraph 30.

31. Answering paragraph 31, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

32. Answering paragraph 32, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

33. Answering paragraph 33, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

34. Answering paragraph 34, defendants deny generally and specifically, each and every, all and singular, the allegations contained therein.

35. Answering paragraph 35, defendants denies [sic] generally and specifically, each and every, all and singular, the allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

Attached hereto as Exhibit "A" is a true and correct copy of the advertisement in issue. This advertisement clearly depicts a robot – i.e., a non-human being – which could not by any stretch of anyone's imagination be mistaken for plaintiff and plaintiff's complaint, and each cause of action therein, therefore fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's complaint, and each cause of action therein, fails to state a claim upon which relief can be granted.

WHEREFORE, defendant prays that plaintiff take nothing by said complaint and that said complaint be dismissed, and that it have and recover its costs of suit herein including its attorneys' fees, and for such other and further relief as may be just.

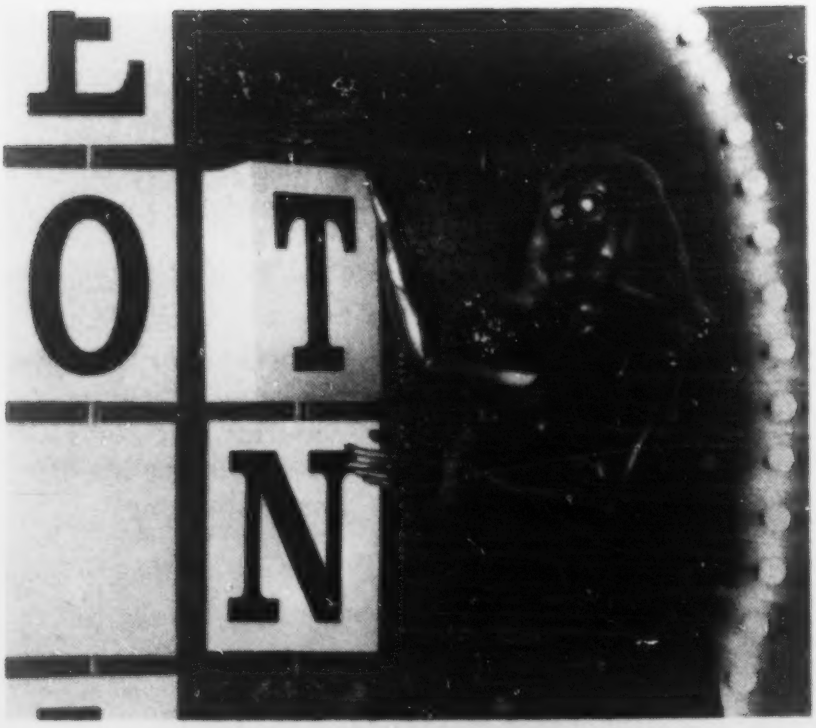
DATED: December 1, 1988

LIEBIG & KULZICK
ANTHONY LIEBIG

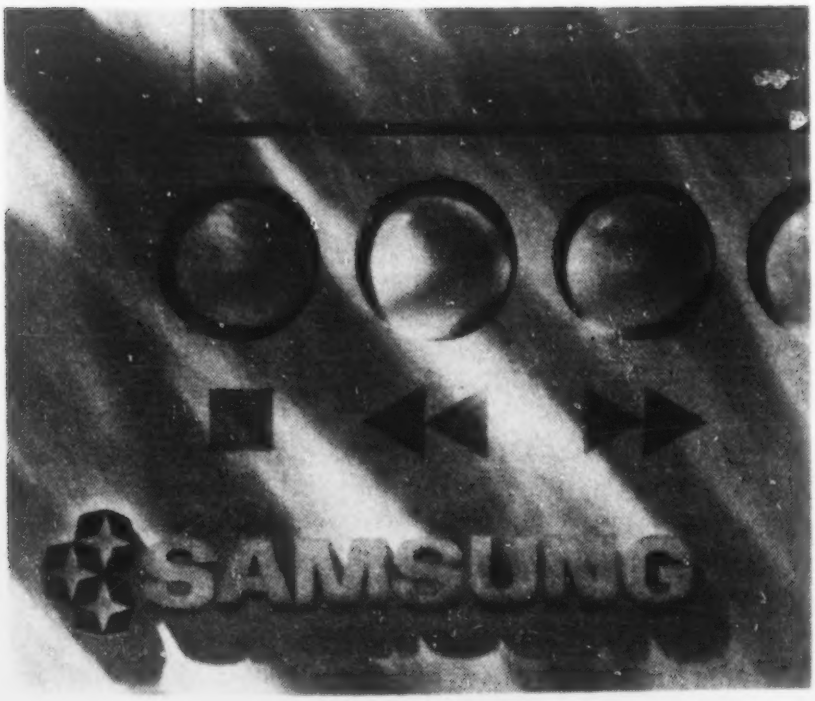
By /s/ Anthony Liebig
Anthony Liebig

Attorneys for Defendants
Samsung Electronics
America, Inc., and
David Deutsch
Associates, Inc.

Exhibit A



Longest-running game show.
2012 A.D.



The VCR you'll tape it on.
2012 A.D.

Samsung. The future of electronics.

APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VANNA WHITE, Plaintiff, vs. SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, and DAVID DEUTSCH ASSOCIATES, INC., a New York corporation.	CASE NO. 88-06499 RSWL(Sx) DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Date: October 9, 1989 Time: 10:00 A.M. Courtroom of the Honorable Ronald S.W. Lew

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Liebig, "Copyright Inroads on the Public Domain in the Ninth Circuit," 9 Ent. Law Rptr. No. 7, p.3 (1987) 11

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I.

INTRODUCTION

This is an action for "commercial misappropriation of likeness" under California Civil Code Section 3344, invasion of the common law right of publicity, interference with prospective economic advantage, and Lanham Act unfair competition.

In essence plaintiff claims defendants wrongfully utilized her "likeness" in a print advertisement.

A true and correct color copy of the accused advertisement is attached as Exhibit A. Plaintiff claims the robot in the top panel is her likeness.

Defendants will depend on plaintiff's attorneys to attach to their response a photograph of plaintiff which they think looks like the robot.

When the advertisement and a real likeness of plaintiff are inspected and compared in the light of the authorities plaintiff must sue under, the Complaint, and each count thereof is revealed to be unprecedented, silly, and subject to summary judgment.

Background Facts

The following facts are not disputed.

"Wheel of Fortune" is a well-known, successful television game show which has run continuously since January 6, 1975. From the show's premiere until the fall of 1982 the hostess on the show was a blonde lady named Susan Stafford. Plaintiff Vanna White, also blonde, has been the hostess on "Wheel of Fortune" since then.

The advertisement in question was one of five "future" advertisements for Samsung Electronics America, Inc., which purported to depict the future in a humorous or mildly satiric manner and told the consumer that Samsung products would be there. The ad shows a representation of the "Wheel of Fortune" set and a *robot* with blonde "hair" over the caption: "Longest-Running Game Show. 2012 A.D."

Defendants' employees who created the ad testified their intention was to portray a 2012 "Wheel of Fortune" with a futuristic robot as the hostess. The advertisement demonstrates they were successful.

Summary of Defendants' Argument

Plaintiff's action must be recognized as a "pioneering effort". Legally, it is vulnerable on three levels of increasing complexity.

On the first, simplest, most obvious level the action may, and should, be disposed of on the ground that defendants' robot could not be mistaken for *any* human being, let alone plaintiff. This was the basis of defendants' earlier motion for Judgment on the Pleadings and is discussed more fully in paragraph II.

On the second level the case is subject to dismissal because the publication of the advertisement could not give rise to an action under Civil Code Section 3344, or constitute a basis for actions for invasion of the right of publicity or interference with prospective economic advantage, because the robot is not a "likeness" of plaintiff within the meaning of Section 3344 and relevant case law. This is discussed more fully in paragraph III.

On the third level the case may be treated and considered as a novel claim and rejected. This is discussed in paragraph IV.

II.

DEFENDANTS ARE ENTITLED TO JUDGMENT BECAUSE THE FIGURE IN THE ADVERTISEMENT IS CLEARLY AND UNMISTAKABLY A ROBOT

All four of plaintiff's counts are predicated on the assertion that an ordinary, reasonable person looking at the Samsung advertisement might believe he is seeing plaintiff Vanna White, that defendants have enlisted her celebrity to grace their ad.

It is obvious beyond any doubt, however, that defendants have depicted a non-human robot, *that they chose not to represent Vanna White or any other human being.*

This is so obvious that the claim should be dealt with as a matter of law. *Scudder Food Products, Inc. v. Ginsberg,* 21 C.2d 596 (1943). *Tomlin v. Walt Disney Productions,* 18 Cal.App.3d 226 (1971). See *International Order of Job's Daughters v. Lindeburg and Company,* 633 F.2d 912 (9th Cir. 1980).

The *Scudder* case is a good analogy because there the plaintiff was complaining that the defendants were confusing customers by using the "same" label. The Superior Court sustained the defendants' demurrer after comparing the labels. The Supreme Court affirmed, stating:

> "While it ordinarily is a question of fact as to whether two containers of labels are so similar as to constitute unfair competition, and it is also ordinarily a question of fact as to whether the public has been or is likely to be mislead, in this case the dissimilarities are so palpable, distinct and clear that it must be held, as a matter of law, that they are not similar, and that the public legally could not be mislead. (21 C.2d at 602). . . . *They are different and the difference is so pronounced that one who runs may read."* (21 C.2d at 600 (emphasis added)) See also: *Don Alvarado Co. v. Porganan,* 203 Cal.App.2d 377 (1962).

In *Tomlin,* the Court also affirmed a summary Judgment predicated in part on its conclusion that "The Love Bug Will Bite You If You Don't Watch Out" was not the same as "Love Bug".

In the copyright area – which is also analogous – the Court's role in comparing the parties' works and deciding against infringement as a matter of law has long

been recognized. See, e.g., *Narell v. Freeman*, 872 F.2d 907, 909-10 (9th Cir. 1989).

III.

DEFENDANTS' ROBOT IS NOT A "LIKENESS" UNDER CALIFORNIA CIVIL CODE SECTION 3344, THE RIGHT OF PUBLICITY CASES, OR THE LANHAM ACT

California Civil Code Section 3344 codified the common law remedy for persons whose names, voices, photographs or "likenesses" were wrongfully used in advertisements to promote the sale of products. As in the case of the tort of invasion of privacy, the essence of the tort is the exposure of the person by the publication of his image. (See, 5 Witkin, *Summary* (9th ed.) Torts p. 685 et seq.).

It is thus not surprising that Section 3344(b)(1) provides:

> "A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use."

Every "likeness" case under Section 3344 has involved *either a photograph or detailed drawing of the plaintiff himself.*

Plaintiff does not have a Section 3344 lawsuit because there is no photograph or other replication of plaintiff and no one could construe the ad as showing the plaintiff, or, indeed, *any* human being.

This is established beyond doubt in two recent cases: *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) and *Nurmi v. Peterson*, 10 U.S.P.Q. 2d 1775 (C.D.Cal. March 31, 1989), copy attached.

In *Midler* the Court held that an *imitation* of a voice, i.e., the use of someone else's similar voice, could not give rise to an action under Section 3344, because, for there to be liability under Section 3344, the person's actual voice had to have been used. (849 F.2d at 463).

In *Nurmi*, the Vampire case, Judge Byrne held that "the use of another character's general characteristics, as opposed to specific facial features, photographs or other exact physical replicas" was not actionable under Section 3344. After reviewing *Midler* and the relevant California authorities Judge Byrne correctly concluded that the term "likeness" in Section 3344 "means an actual representation of a person, rather than a close resemblance." *Nurmi, supra*, at 1777.

Section 3344 was rooted in the common law rights of publicity and privacy. See *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 417, 198 Cal.Rptr. 342, 346 (1983). 5 Witkin, *Summary* (9th ed.) Torts pp. 687 et seq. To maintain a right of publicity claim a plaintiff must prove his name or likeness was used without consent. As in actions under Section 3344, "likeness" means an exact replication. Again, Judge Byrne succinctly stated the issue and its resolution:

> "To maintain a right of publicity claim, a plaintiff must show that his or her name or likeness was appropriated without consent. *Eastwood, supra*, at 347. The plaintiff cites two

cases, *Midler, supra,* and *Chaplin v. Amador,* 269 P. 544 (Cal.App. 1928) for the proposition that the imitation of a distinctive character is actionable under the right of publicity. However, in both of these cases, the courts permitted the plaintiffs to sue only for the defendants' fraudulent attempt to deceive the public into believing that the plaintiffs were actually present. In *Midler,* the court found that plaintiff's voice was duplicated such that the public could be induced to think that she was actually performing in a car commercial. 849 F.2d at 463-64 [7 U.S.P.Q. 2d at 1401]. In *Chaplin,* an imitator attempted to defraud the series of films. 269 P. at 545-46.

Consequently, in both of the cases cited by the plaintiff, a suit was permitted to go forward only on the plaintiffs' fraud claims and not on right of privacy or publicity grounds. Indeed, in *Midler,* as discussed above the plaintiff was precluded from bringing a §3344 claim which is analogous to a common law right of publicity action. Thus, neither case supports the proposition that a person's use of a character that bears a mere resemblance to another is actionable under the common law right of publicity.

In this case, the plaintiff does not allege that the defendants actually tried to copy exactly the Vampira character in creating Elvira. By the plain terms of the complaint, the defendants are alleged to have created a new character that resembled the Vampira character but which used a different name and employed a different actress in the lead role. The Court finds that because these allegations do not amount to the claim that the plaintiff's actual features were

> used by the defendants for commercial purposes, no common law right of publicity or privacy action can be maintained. Thus, the plaintiff's fourth and fifth claims are dismissed." *Nurmi, supra,* at 1778.

The count for Lanham Act unfair competition is predicated upon the assertion that a consumer could "confuse" the whimsical robot in the advertisement with plaintiff Vanna White. Again the ad belies the allegations because the robot is not a "likeness." See authorities cited in paragraph II. As a consequence, plaintiff can establish none of the elements of a cause of action under the Lanham Act; no one could possibly confuse defendants' robot with plaintiff. *Cf. Allen v. Men's World Outlet, Inc.,* 679 F.Supp. 360 (S.D.N.Y. 1988).

Further, by portraying what was obviously a robot in the year 2012, *defendants were clearly saying they were not portraying any human being, including Vanna White.*

IV.

THE COURT SHOULD NOT MAKE NEW LAW FOR VANNA WHITE

Unquestionably this suit is a pioneering effort. There is no statutory or case authority for a cause of action based on an advertisement such as defendants'.

If plaintiff's pioneering effort is to be taken at all seriously, it must be taken *very* seriously, for it raises questions which are both complex and far reaching.

For proper analysis it is imperative to define this claim as accurately as possible and without rhetorical

coloration. At the outset it is important to recognize that plaintiff *cannot* claim that:

1. Defendants used her actual photograph or likeness, or that

2. Defendants produced a figure which could be mistaken for plaintiff, i.e., a masquerade as in *Onassis v. Christian Dior*, 472 N.Y.S. 2d 254 (1984); and *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S. 2d 661 (1977).

The most plaintiff can claim is that persons who saw the ad who were familiar with "Wheel of Fortune" and Vanna White were *reminded* of Vanna White, that is, *by the unconscious process of association*, Vanna White may have popped into their conscious minds. In short, defendants produced an ad which may have made some people *think* briefly about Vanna White while understanding they were not seeing her.

The main triggers for this association are the words "Longest Running Game Show" and the depiction of the "Wheel of Fortune" set. The "blonde" robot probably had some associative effect, but a baboon there would have had as much.

So is the law going to create a cause of action against one who merely causes someone to be thought about by someone else???

In considering this novel question, the Court may take judicial notice of the fact that plaintiff has willingly become "part of the American scene" and her name and image are undoubtedly stored in the unconscious' of many.

If the Court is to take this leap into space, its consideration should be informed by some principles and concepts in cognate areas:

Freedom of Speech. U.S. Constitution, First Amendment. There is no such thing as a false idea or opinion. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974) "Though First Amendment concerns do not insulate titles of artistic works from all Lanham Act claims, such concerns must nonetheless inform our consideration of the scope of the Act as applied to claims involving such titles." *Rogers v. Grimaldi,* 695 F.Supp. 112 (S.D.N.Y. 1988). In this regard freedom of commercial speech is alive and well. *Board of Trustees SUNY v. Fox,* 492 U.S. ___, 106 L.Ed.2d 388, 109 S.Ct. ___ (1989).

Public Domain status of ideas and expression. 17 U.S.C. 102(b); *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 11 L.Ed.2d 661, 84 S.Ct. 784 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 11 L.Ed.2d 669, 84 S.Ct. 779 (1964); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. ___, 103 L.Ed.2d 118, 109 S.Ct. 971 (1989); *Desny v. Wilder,* 46 C.2d 715 (1956); Liebig, "Copyright Inroads on the Public Domain in the Ninth Circuit", 9 Ent. Law Rptr. No. 7, p.3 (1987)

Contract/Copyright. See *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663 (7th Cir. 1986) which holds that performers' acts, moves, gestures in a copyrighted broadcast are the property of the employer and subsumed by his copyright.

Performers' Rights. See *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (1970) and *Davis v. Trans*

World Airlines, 297 F. Supp. 1145 (C.D. Cal. 1969) which hold that imitation alone does not give rise to a cause of action; and *KGB, Inc. v. Giannoulas*, 104 Cal.App.3d 844, 856, 164 Cal.Rptr. 571 (1980). See also *Lugosi v. Universal Pictures*, 25 Cal.3d 813, Mosk concurrence at p. 825 (1979), and Liebig, "Style and Performance," 17 Bull. Copyright Society of U.S.A. 40 (1969), which points out that performers always imitate someone.

Artistic Freedom. See *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, conc. opinion at 869 (1979). See also Carlin, "Culture Vultures: Artistic Appropriation and Intellectual Property Law," 13 Columbia-VLA Journal of Law & The Arts 103, which discusses, in legal context, the fact that in recent decades media disseminations have wrought changes in the nature of life and art, our cultural symbols and collective sense of reality, such that artists are compelled to incorporate into their works the popular images that pervade our daily lives.

Fair Use. See 17 U.S.C. §107; "Trademark Parody: A Fair Use and First Amendment Analysis," 72 Va. L. Rev. 1079 (1986).

Humor/Parody Privilege. See *Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 552-55 (and Notes 10-14). *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46, 99 L.Ed.2d 41, 108 S.Ct. 876 (1988); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987); Dorsen, "Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies without Wrongs," 65 B.U.L. Rev. 923 (1985); "Trademark Parodies and Free Speech: An Expansion of Parodists' First Amendment Rights in *L.L. Bean, Inc. v. Drake*

Publishers, Inc.," 73 Iowa L. Rev. 961 (1988); "*Hustler Magazine, Inc. v. Falwell:* Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism," 16 Pepperdine L. Rev. 97 (1988).

In peeking into this Pandora's Box the Court should also consider where this uncaged monster might run and how to instruct the jury about it.

V.

CONCLUSION

Defendants are entitled to summary judgment on all counts.

Defendants are entitled to their attorneys fees under California Civil Code Section 3344.

The Court should also consider awarding sanctions under Rule 11 for bringing such a silly case.

DATED: September 15, 1989

Respectfully submitted,

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APPENDIX C

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VANNA WHITE, Plaintiff, vs. SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, and DAVID DEUTSCH ASSOCIATES, INC., a New York corporation.	CASE NO. 88-06499 RSWL(Sx) STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW Date: October 9, 1989 Time: 10:00 A.M. Courtroom of the Honorable Ronald S.W. Lew

Statement of Uncontroverted Facts

1. Plaintiff Vanna White is a resident of the State of California and defendants Samsung Electronics America, Inc., and David Deutsch Associates, Inc., are both corporations incorporated under the laws of the State of New York.

2. The advertisement at issue, a true and correct copy of which is appended to the Answer herein, was created,

produced, and caused to be included in magazines published throughout the United States by defendants.

3. "Wheel of Fortune" is a well-known, successful television game show. It has been broadcast continually since January 6, 1975. From the show's premier until the fall 1982 the hostess on the show was a blonde lady named Susan Stafford. Since the fall of 1982 plaintiff Vanna White, also a blonde lady, has been the hostess on "Wheel of Fortune".

4. The robot depicted in said advertisement is not a likeness of plaintiff Vanna White.

5. A reasonable person could not mistakenly identify, or confuse said depiction of a robot with, plaintiff Vanna White.

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter herein.

2. The depiction of the robot in said advertisement is not a "likeness" of plaintiff within the meaning of California Civil Code Section 3344 or the authorities defining the right of publicity.

3. The creation and publication of said advertisement did not give rise to any known cause of action in favor of plaintiff and against defendants.

4. Defendants are entitled to judgment.

DATED: September 15, 1989

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ANTHONY LIEBIG

By /s/ Anthony Liebig
Anthony Liebig

Attorneys for Defendants
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America, Inc. and David
Deutsch Associates, Inc.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VANNA WHITE, Plaintiff-Appellant, vs. SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, and DAVID DEUTSCH ASSOCIATES, INC., a New York corporation. Defendants-Appellees.	CA NO. 90-55840 APPEAL FROM SUMMARY JUDGMENT UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA (Case No. CV-88-06499-RSWL) (Hon. Ronald S. W. Lew, Judge)

BRIEF OF APPELLEES

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ADDENDUM: Photocopy of the subject advertisement

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Dorsen, "Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies without Wrongs," 65 B.U.L. Rev. 923 (1985) 17

"*Hustler Magazine, Inc., v. Falwell*: Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism," 16 Pepperdine L.Rev. 97 (1988) 18

Liebig, "Copyright Inroads on the Public Domain in the Ninth Circuit," 9 Ent. Law Rptr. No. 7, p.3 (1987) 15

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"Trademark Parody: A Fair Use and First Amendment Analysis," 72 VA. L. REV. 1079 (1986) 17

"Trademark Parodies and Free Speech: An Expansion of Parodists' First Amendment Rights in *L.L. Bean, Inc. v. Drake Publishers, Inc.*," 73 Iowa L.Rev. 961 (1988) 18

5 Witkin, *Summary* (9th ed. 1988) Torts Sections 587 et seq 7, 8

I.

STATEMENT OF JURISDICTION

Defendants/Appellees agree with Plaintiff/Appellant's Statement of Jurisdiction.

II.

STATEMENT OF ISSUE ON APPEAL

Did the District Court err in granting the Defendant/Appellees' Motion for Summary Judgment.

III.

STANDARD OF REVIEW

The standard of review is the same as the standard for ruling on the Motion for Summary Judgment below. It is set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-26, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252, 106 S.Ct. 2505 (1986); and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

IV.

STATEMENTS OF FACTS

Defendants agree with the basic facts as stated in plaintiff's Opening Brief, but not with plaintiff's skewing; and we would point out several significant omissions.

First and foremost, plaintiff does not fairly characterize the advertisement in question. We therefore attach a copy as an Addendum hereto.

The subject advertisement speaks for itself and no amount of lawyers' rhetoric can change what it says. It will be noted that the 1988 advertisement contains a spoof about a current television game show still being broadcast 24 years hence and being videotaped on a Samsung VCR in 2012 A.D.

The television game show, "Wheel of Fortune," was a well-known, successful show which had run continuously since January 6, 1975. From the show's premiere until the fall of 1982 the hostess on the show was a blonde lady named Susan Stafford. Plaintiff Vanna White, also blonde, has been the hostess of "Wheel of Fortune" since then. If the show were still on the air in 2012 there undoubtedly would have been an intervening series of pretty blond ladies in the hostess role. In 2012 there would probably be a blond hostess who was born around 1988.

By choosing to use a robot in the advertisement rather than a lady of any age, defendants intended to, and did, avoid any representation or inference that the depiction of the 2012 A.D. game show included a depiction of Vanna White or any other human being.

V.

SUMMARY OF DEFENDANTS' ARGUMENT

Plaintiff's action must be recognized as a "pioneering effort" which was undoubtedly inspired by some of the

loose language in this court's decision in *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

Legally, plaintiff's claim is vulnerable on three levels of increasing complexity.

On the first, simplest, most obvious level the action may be disposed of on the ground that defendants' robot could not be mistaken for *any* human being, let alone plaintiff. This was the basis of Judge Lew's ruling below.

On the second level the case lacks validity because the publication of the advertisement could not give rise to an action under California Civil Code Section 3344, or constitute a basis for actions for invasion of the right of publicity or under the Lanham Act, because the robot is not a "likeness" of plaintiff within the meaning of Section 3344 and relevant case law.

On the third level the case may be treated and considered as a novel claim and rejected as contrary to prevailing legal principles and policies.

VI.

ARGUMENT

A. Defendants Were Entitled to Judgment Because the Figure in the Advertisement is Clearly and Unmistakably a Robot

Plaintiff's action was predicated on the assertion that an ordinary, reasonable person looking at the Samsung advertisement might believe he was seeing plaintiff Vanna White, that defendants had enlisted her celebrity to grace their ad.

It is obvious beyond any doubt, however, that defendants depicted a non-human robot, *that they deliberately chose not to represent Vanna White or any other human being.*

This is so obvious that the claim was properly dealt with as a matter of law. *Scudder Food Products, Inc. v. Ginsberg,* 21 C.2d 596 (1943). *Tomlin v. Walt Disney Productions,* 18 Cal.App.3d 226 (1971). See *International Order of Job's Daughters v. Lindeburg and Company,* 633 F.2d 912 (9th Cir. 1980).

The *Scudder,* case is a good analogy because there the plaintiff was complaining that the defendants were confusing customers by using the "same" label. The California Superior Court sustained the defendants' demurrer after comparing the labels. The California Supreme Court affirmed, stating:

> "While it ordinarily is a question of fact as to whether two containers or labels are so similar as to constitute unfair competition, and it is also ordinarily a question of fact as to whether the public has been or is likely to be misled, in this case the dissimilarities are so palpable, distinct and clear that it must be held, as a matter of law, that they are not similar, and that the public legally could not be misled. (21 C.2d at 602). . . . *They are different and the difference is so pronounced that one who runs may read."* (21 C.2d at 600 (emphasis added)) See also: *Don Alvarado Co. v. Porganan,* 203 Cal.App.2d 377 (1962).

In *Tomlin,* the California Court of Appeal also affirmed a summary Judgment predicated in part on its conclusion that "The Love Bug Will Bite You If You Don't Watch Out" was not the same as "Love Bug".

In the copyright area – which is analogous – the Trial Court's role in comparing the parties' works and deciding whether there could be infringement as a matter of law has long been recognized. See, e.g., *Narell v. Freeman*, 872 F.2d 907, 909-10 (9th Cir. 1989).

B. Defendant's Robot is Not a "Likeness" under California Civil Code Section 3344, the Right of Publicity Cases, or the Lanham Act

California Civil Code Section 3344 codified and supplemented the common law remedy for persons whose names, voices, photographs or "likenesses" are wrongfully used in advertisements to promote the sale of products. *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 417 (1983) As in the case of the tort of invasion of privacy, the essence of the tort is the exposure of the person by the publication of his image. (See, 5 Witkin, *Summary* (9th ed. 1988) Torts Sections 587 et seq.).

It is thus not surprising that Section 3344(b)(1) provides:

> "A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use."

Every "likeness" case under Section 3344 has involved *either a photograph or detailed drawing of the plaintiff himself*. Plaintiff cannot change this with word games about "resemblance", "correspondence of appearance of superficial qualities," etc.

Plaintiff does not have a Section 3344 lawsuit because there is no photograph or other replication of plaintiff and no one could construe the ad as showing the plaintiff, or, indeed, *any* human being. This was established beyond doubt in two recent cases: *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) and *Nurmi v. Peterson*, 10 U.S.P.Q. 2d 1775 (C.D.Cal. March 31, 1989).

In *Midler* this Court held that an *imitation* of a voice, i.e., the use of someone else's similar voice, could not give rise to an action under Section 3344, because, for there to be liability under Section 3344, the person's *actual voice* had to have been used. (849 F.2d at 463).

In *Nurmi*, the "Vampira" case, Judge Byrne held that "the use of another character's general characteristics, as opposed to specific facial features, photographs or other exact physical replicas" was not actionable under Section 3344. After reviewing *Midler* and the relevant California authorities Judge Byrne correctly concluded that the term "likeness" in Section 3344 "means an actual representation of a person, rather than a close resemblance." *Nurmi, supra*, at 1777.

Section 3344 was rooted in the common law rights of publicity and privacy. See *Eastwood v. Superior Court, supra*, 5 Witkin, *Summary* (9th Ed. 1988) Torts pp. Sections 589 et seq. To maintain a right of publicity claim a plaintiff must prove his name or likeness was used without consent. As in actions under Section 3344, "likeness" means an exact replication. Again, Judge Byrne succinctly stated the issue and its resolution:

> "To maintain a right of publicity claim, a plaintiff must show that his or her name or likeness

was appropriated without consent. *Eastwood, supra*, at 347. The plaintiff cites two cases, *Midler, supra*, and *Chaplin v. Amador*, 269 P. 544 (Cal.App. 1928) for the proposition that the imitation of a distinctive character is actionable under the right of publicity. However, in both of these cases, the courts permitted the plaintiffs to sue only for the defendants' fraudulent attempt to deceive the public into believing that the plaintiffs were actually present. In *Midler*, the court found that plaintiff's voice was duplicated such that the public could be induced to think that she was actually performing in a car commercial. 849 F.2d at 463-64 [7 U.S.P.Q. 2d at 1041]. In *Chaplin*, an imitator attempted to defraud the series of films. 269 P. at 545-46.

Consequently, in both of the cases cited by the plaintiff, a suit was permitted to go forward only on the plaintiffs' fraud claims and not on right of privacy or publicity grounds. Indeed, in *Midler*, as discussed above, the plaintiff was precluded from bringing a Section 3344 claim which is analogous to a common law right of publicity action. Thus, neither case supports the proposition that a person's use of a character that bears a mere resemblance to another is actionable under the common law right of publicity.

In this case, the plaintiff does not allege that the defendants actually tried to copy exactly the Vampira character in creating Elvira. By the plain terms of the complaint, the defendants are alleged to have created a new character that resembled the Vampira character but which used a different name and employed a different actress in the lead role. The Court finds that

> because these allegations do not amount to the claim that the plaintiff's actual features were used by the defendants for commercial purposes, no common law right of publicity or privacy action can be maintained. Thus, the plaintiff's fourth and fifth claims are dismissed." *Nurmi, supra,* at 1778.

Plaintiff's count for Lanham Act unfair competition is also predicated on the assertion that a consumer could "confuse" the whimsical robot in the advertisement with plaintiff Vanna White. Again the ad belies the allegations because the robot is not a "likeness." As a consequence, plaintiff can establish none of the elements of a cause of action under the Lanham Act; no one could possibly confuse defendants' robot with plaintiff. *Cf. Allen v. Men's World Outlet, Inc.,* 679 F.Supp. 360 (S.D.N.Y. 1988). Further, by portraying what was obviously a robot in the year 2012, *defendants were clearly saying they were not portraying any human being, including Vanna White.*

C. This Court Should Not Make New Law for Vanna White

Unquestionably this suit is a pioneering effort. There is no statutory or case authority for a cause of action based on an advertisement such as defendants'.

Plaintiff is apparently claiming some kind of property interest in something beyond her mere likeness or image – perhaps her style, aura, aurora, gestalt, or penumbra.

If plaintiff's pioneering effort is to be taken at all seriously, it must be taken *very* seriously, for it raises

questions of California and federal law which are both complex and far reaching.

For proper analysis it is imperative to define this claim as accurately as possible and without rhetorical coloration. At the outset it is important to recognize that plaintiff *cannot* claim that:

1. Defendants used her actual photograph or likeness, or that

2. Defendants produced a figure which could be mistaken for plaintiff, i.e., a masquerade as in *Onassis v. Christian Dior*, 472 N.Y.S. 2d 254 (1984).

The *most* plaintiff can claim is that persons who saw the advertisement who were familiar with "Wheel of Fortune" and Vanna White were *reminded* of Vanna White – that is, *by the unconscious process of association*, Vanna White may have popped into their conscious minds. In short, defendants produced an ad which may have made some people *think* briefly about Vanna White while understanding they were not seeing her.

The main triggers for this association are the words "Longest Running Game Show" and staging suggestive of the "Wheel of Fortune" set. The "blonde" robot probably had some associative effect, but a baboon there would have had as much.

Unquestionably plaintiff was asking the Trial Court to create a California cause of action against one who merely caused someone *to be thought about* by someone else.

In her Motion for Reconsideration plaintiff asserted "attributes of her identity"[1] had been appropriated and pointed to evidence indicating that defendants were aware of her existence and her known relationship with "Wheel of Fortune." In denying the Motion Judge Lew stated:

> "A showing of a defendant's intent to cause a viewer of an advertisement *to think of a plaintiff when viewing an advertisement* does not entitle a plaintiff to relief under either of these laws. Thus this argument by plaintiff is meritless."
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> (Order of December 21, 1989, Excerpt of Record, p. 31, emphasis added.)

In considering plaintiff's novel claim, this Court should take judicial notice of the fact that plaintiff eagerly became "part of the American scene." She has become something of a "celebrity" and has profited handsomely. Her name and image are undoubtedly stored in the unconscious' of many. She may even have been "part of

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[1] The term "attributes of one's identity" has been a favorite of imaginative plaintiff's lawyers, and at least one opinion writer, since it was used loosely in *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974). But *Motschenbacher* did not recognize any new California tort stemming from an appropriation of the "attributes of one's identity." *Motschenbacher* was a garden variety privacy/publicity case. There was never any question in *Motschenbacher* as to whether or not the plaintiff could maintain an action for invasion of privacy and/or publicity *if he was identified, that is, if a viewer of the commercial could reasonably deduce his presence inside the pictured racing car.* Judge Real concluded this could not be done and granted Summary Judgment. This Court vacated the Summary Judgment, leaving the question of "identifiability" to the trier of fact.

the cultural history of an era."[2] but she did not become a sacred cow.

The Court's consideration should also be informed by some principles and concepts in cognate areas:

> *Freedom of Speech.* United States Constitution, First Amendment. Whether or not the robot depiction be deemed artistic expression, or, because it appeared in an advertisement, commercial speech, it is entitled to a large measure of protection. *Board of Trustees S.U.N.Y. v. Fox,* 492 U.S. ___, 106 L.Ed.2d 388, 109 S.Ct. 3028 (1989);*U.S. Healthcare v. Blue Cross of Gr. Phil.,* 898 F.2d 914 (3rd Cir. 1990), cert. denied October 1, 1990. "Though First Amendment concerns do not insulate titles of artistic works from all Lanham Act claims, such concerns must nonetheless inform our consideration of the scope of the Act as applied to claims involving such titles." *Rogers v. Grimaldi,* 875 F.2d 994, 998 (2d Cir. 1989).
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> *Public Domain* status of ideas and expression. 17 U.S.C. 102(b); *Sears Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 11 L.Ed.2d 661, 84 S.Ct. 784 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U.S. 234, 11 L.Ed.2d 669, 84 S.Ct. 779 (1964); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. ___, 103 L.Ed.2d 118, 109 S.Ct. 971 (1989); *Desny v. Wilder,* 46 C.2d 715 (1956); Liebig, "Copyright Inroads on the Public Domain in the Ninth Circuit", 9 Ent. Law Rptr. No. 7, p.3 (1987)

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[2] *Rogers v. Grimaldi,* 695 F.Supp. 112, 123 (S.D.N.Y. 1988) affirmed at 875 F.2d 994 (2d Cir. 1989)

Contract/Copyright. See *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663 (7th Cir. 1986) which holds that performers' acts and appearance in a copyrighted broadcast are the property of the employer and subsumed by his copyright.

Performers' Rights. That is, the rights of *other* performers. See *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (1970) and *Davis v. Trans World Airlines*, 297 F. Supp. 1145 (C.D. Cal. 1969) which hold that imitation alone does not give rise to a cause of action; and *KGB, Inc. v. Giannoulas*, 104 Cal.App.3d 844, 856, 164 Cal.Rptr. 571 (1980). See also *Lugosi v. Universal Pictures*, 25 Cal.3d 813, Mosk concurrence at p. 825 (1979), and Liebig, "Style and Performance," 17 Bull. Copyright Society of U.S.A. 40 (1969), which discusses the inevitability of imitation.

Artistic Freedom. See *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, conc. opinion at 869 (1979). See also Carlin, "Culture Vultures: Artistic Appropriation and Intellectual Property Law," 13 Columbia-VLA Journal of Law & the Arts 103, which discusses, in legal context, the fact that in recent decades media disseminations have wrought changes in the nature of life and art, our cultural symbols and collective sense of reality, such that artists are compelled to incorporate into their works these popular images that pervade our daily lives.

Fair Use. See 17 U.S.C. 107. "The District Court concluded, among other things, that the parody did not make more extensive use of appellant's song than was necessary to 'conjure up' the original. 482 F.Supp. at 747. While we agree with this conclusion, we note that the concept of

'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955). A parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." *Ellesmere Music, Inc., v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980); See also, *Tin Pan Apple, Inc., v. Miller Brewing Co., Inc.*, 737 F.Supp. 826 (S.D.N.Y. 1990)

Humor/Parody Privilege. See *Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 552-55 (and Notes 10-14). *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46, 99 L.Ed.2d 41, 108 S.Ct. 876 (1988); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987); Dorsen, "Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies without Wrongs," 65 B.U.L. Rev. 923 (1985); "Trademark Parody: A Fair Use and First Amendment Analysis," 72 Va. L. Rev. 1079 (1986); "Trademark Parodies and Free Speech: An Expansion of Parodists' First Amendment Rights in *L.L. Bean, Inc. v. Drake Publishers, Inc.*," 73 Iowa L. Rev. 961 (1988); "Hustler Magazine, Inc. v. Falwell: Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism," 16 Pepperdine L. Rev. 97 (1988).

VII.

CONCLUSION

The Judgment below should be affirmed.

DATED: November 2, 1989

Respectfully submitted,

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